

No. 16465

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United States  
Court of Appeals  
for the Ninth Circuit

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UNION PAVING COMPANY, Appellant,

vs.

DOWNER CORPORATION, Appellee.

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Transcript of Record

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Appeal From The United States District Court For The  
Northern District of California,  
Northern Division

FILED

JUL - 7 1959

PAUL P. O'BRIEN, CLERK



No. 16465

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the United States District Court, Northern  
District of California, Northern Division

No. 6960

DOWNER CORPORATION, a California Corpo-  
ration; and RAY H. DOWNER,

Plaintiffs,

vs.

UNION PAVING CO., a Nevada Corporation,  
Defendant.

### FIRST AMENDED COMPLAINT

Now come the Plaintiffs above-named and file this, their First Amended Complaint, and for cause of action allege:

#### First Cause of Action

##### I.

That Plaintiff Ray H. Downer is a citizen of the State of California and resides at Stockton, San Joaquin County, California, in the above-named Division and District; that the Plaintiff Downer Corporation is, and at all times herein mentioned was, a California Corporation having its principal office and doing business in the City of Stockton, County of San Joaquin, State of California, and in the above-named Division and District; that the Defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State

of Nevada and is, and was, doing business at various places in the State of California; that the jurisdiction is founded only on diversity of citizenship; that the amount in controversy exceeds the sum of Three Thousand (\$3,000.00) Dollars, exclusive of interest;

## II.

That on or about the 11th day of March, 1948, the Plaintiffs and the Defendant entered into a written Agreement, a true copy of which is attached hereto, marked "Exhibit A" and prayed to be read as a part hereof and incorporated herein as though the provisions thereof were herein fully set forth;

\* \* \* \* \*

## IV.

That under the terms of said Agreement, Plaintiffs and Defendant formed a joint venture for the purpose of carrying out certain work to be performed near Bakersfield, California, all within the County of Kern, for the Mt. Vernon County Sanitation District; that all of said work has been performed to the satisfaction of said Mt. Vernon County Sanitation District and has been accepted by said District;

\* \* \* \* \*

/s/ FORREST E. MACOMBER,

/s/ GORDON J. AULIK,

Attorneys for Plaintiffs.

## EXHIBIT "A"

This Agreement, made this 11th day of March, 1948, by and between Downer Corporation, a California corporation, and Ray H. Downer, its alter ego, parties of the first part, and Union Paving Co., a Nevada corporation, party of the second part,

Witnesseth:

Whereas, first party hereto has submitted a bid to the Board of Directors of Mt. Vernon, County Sanitation District in Kern County, California, on February 16, 1948, for the doing of certain sewer construction in said district on a unit price basis estimated at \$763,966.85, plus incidental expenses for the specific units of work therein specified and has been awarded the contract by the said Board of Directors and upon the receipt of a written opinion from the first parties' attorney or attorneys reciting that all acts and legal proceedings required to be done precedent to the award of the contract have been done in strict accordance with the law, said first parties intend to and will execute the contract for the doing of said work and to complete the work called for under said contract and in accordance with the terms hereof; and

Whereas, the parties hereto have formed a joint venture for the purpose of carrying out and performing the work to be done under said contract and any additional private contract work to be performed in connection with said sanitary district sewer such as sewer laterals for house con-

## Exhibit "A"—(Continued)

nections, under the name of Downer Mount Vernon Project; and

Whereas, it is desirable that the rights, interests, and obligations of the parties hereto, as such joint venturers under said contract, and any profits to be derived therefrom, and any liability for any and losses arising out of the performance of said work, or which may be incurred in connection therewith, be defined by an agreement in writing;

Now, Therefore, It Is Agreed as Follows:

1. First parties and second party agree to finance the doing of said work and to perform the said contract as a joint venture on the following basis:

(a) The bank of the joint venture shall be the Anglo California National Bank—Bakersfield Office, or such other bank or banks as the joint venture shall from time to time agree upon. All moneys, checks and other negotiable instruments as received shall be deposited in said bank to the credit of the joint venture in its General Account to be carried under said joint venture name. The withdrawal of moneys from said General Account shall be only upon two joint signatures, one of whom shall be a person designated by first parties and one of whom shall be a person designated by second party; it being understood and agreed that the first and second parties will designate for the purpose of convenience more than one person who may act on its behalf as such co-signer.

(b) In addition to the above General Account there shall be established in said bank two Special

## Exhibit "A"—(Continued)

Joint Venture revolving accounts which are to be replenished weekly, if necessary, and against which payroll checks are to be issued in amounts not to exceed \$200.00 for any one check and the other account for the payment of workmen employed on the job promptly they quit or are discharged; and checks in said two special accounts shall need only one signature, by a person to be agreed upon by the parties hereto.

(c) Upon or prior to the execution of said contract by Downer Corporation with said Sanitary District, second party shall forthwith deposit in the aforesaid mentioned bank to the credit of said joint venture the sum of \$55,000.00, as an initial deposit on account of costs; and

(d) Second party agrees that it will pay or advance from time to time such further moneys as may be necessary to the conduct of said work over and above said initial deposit by second party. In that connection, the manager on or before the 5th day of each calendar month shall furnish to second party a statement of the additional funds that are anticipated to be required during said calendar month for the prosecution of said work in the judgment of said manager; and second party shall deposit in said account for the benefit of said joint venture the amount of such monthly estimate on or before the tenth day of such calendar month; and first and second parties acting through their respective agents, as co-signers, agree to promptly issue checks for and pay and discharge all liabili-



## Exhibit "A"—(Continued)

ties arising under said contract in this joint venture.

(2) As additional security to the said second party for the repayment by the joint venture to it of moneys contributed by it to the joint venture, first party agrees immediately upon the execution of said contract to execute an assignment thereof to Union Paving Co. in proper form.

(3) Proper books of account shall be kept by a competent accountant, wherein shall be entered particulars of all moneys, materials, or effects belonging to or owing to or by the joint venture, or paid, received or sold or purchased in the course of the venture, and of all such transactions, matters, and things relating to said joint venture as are usually entered in books of account kept by persons engaged in a business of the like character. Said books of accounts, together with all letters, papers, or documents concerning or belonging to said venture shall be kept at the place of business of said venture, to be hereafter agreed upon, and each member of the said venture shall at all times have free access to and the right to inspect and copy the same.

(4) As soon as practicable after the first day of each month during the continuance of the work, an account shall be taken by said accountant (or by some other accountant to be agreed upon by the members of the joint venture) of all capital, assets and liabilities for the time being of said joint venture and a balance sheet and profit and loss state-

## Exhibit "A"—(Continued)

ment shall be prepared and a copy thereof shall be furnished to first and second parties hereto, who shall be bound thereby unless some manifest error or errors shall need to be rectified.

(5) The first parties represent that they own an adequate amount of machinery, tools, plant and equipment required for the complete installation of said work, except as herein otherwise provided, and of sufficient capacity and of such character to insure sufficient progress of operations to carry the work to completion within the time specified in the contract. Said first parties agree to provide all said equipment for the construction of said work and warrant said equipment to be adequate and suitable to meet the above requirements so as not to hinder the diligent progress of the work. The second party agrees to furnish one crane and one bulldozer, and neither the first nor second party shall receive any compensation for the use of said machinery, tools, plant and equipment, other than the right to participate in the net profit in the proportions hereinabove set forth.

(6) None of the parties hereto will make any charge against the work for any ordinary overhead expense or for time which may be expended in connection with the work by any of the parties hereto, or their officers, agents or employees except only such officers, agents, and employees as may be employed in the joint venture in actually carrying on construction under the contract; and the rate of pay for any and all such employees shall be sub-

## Exhibit "A"—(Continued)

ject to and require the approval of the other member.

(7) Ray H. Downer is to act as manager, without compensation, and in the event of the death or disability of said Ray Downer, the other party to this agreement shall mutually agree upon a manager for the joint venture in his place; and if the first parties shall make default under their said agreement with the Mt. Vernon Sanitation District, the second party herein may assume and take full and immediate charge and supervision and may use and adopt such measures and means as it may deem advisable to remedy the default and insure against further default.

(8) It is further understood and agreed that first party is required to give a statutory labor and material bond and a faithful performance bond covering the contract with said Sanitation District, and second party agrees to act as a co-signer with first parties upon the application to Pacific Indemnity Company for said bonds.

(9) In the event of the bankruptcy or the involuntary dissolution of any of the parties hereto, this joint venture shall cease and terminate. The successors or trustees of any party or parties hereto so dissolving or becoming bankrupt shall cease to have any interest in the work to be done under said contract and shall cease to have any interest in and to the assets of the joint venture. In any such case the remaining parties shall have the right to carry out and perform the remainder of the work



## Exhibit "A"—(Continued)

to be done under said contract, and upon completion thereof such remaining joint venturer shall account to the successors or trustees of any such party or parties which may have become bankrupt or may have become dissolved and such successors or trustees of any such bankrupt or dissolved party shall, upon the completion of the work under said contract, be entitled to receive from the remaining joint venturer an amount equal to the sums advanced by the party they represent, plus such party's proportionate share of the profits resulting from the performance of the work under said contract to the date that the party they represent was dissolved or became bankrupt, less such party's proportionate share of the losses to said date, resulting from the performance of the work under said contract; provided, however, that the gain or loss computed as of said time shall be in the same proportion to the whole gain or loss resulting from the performance of all of the work under said contract as the amount of work done thereunder at said time bears to all of the work which is done thereunder. The books of the joint venture shall be conclusive in establishing whether such gain has been realized or loss sustained and the amount thereof.

The said joint venture hereby formed shall be terminated upon the fulfillment of and the acceptance of said work herein proposed to be performed and the collection of the monies and bonds payable and to be paid therefrom and the payment and discharge of all debts, claims and demands against

## Exhibit "A"—(Continued)

said contract. The surplus monies or bonds remaining after the payment and discharge of all said debts, claims and demands shall be applied, first, to the repayment in full to second party of the cash contributed by it, and second, after said second party shall have been fully repaid its contribution, the net income remaining, if any, whether eventually in the form of cash or bonds shall be equitably distributed as follows: To the first parties 50% thereof, and to the second party 50% thereof, bonds and assessments being distributed at par.

In Witness Whereof, the parties hereto have executed this agreement as of the day and year first above written.

DOWNER CORPORATION,

a California corporation,

By RAY H. DOWNER,

and

RAY H. DOWNER,

(First Parties.)

UNION PAVING CO.,

a Nevada corporation,

By J. A. DOWLING,

Pres.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed December 9, 1953.

[Title of District Court and Cause.]

**ANSWER AND COUNTERCLAIM TO FIRST  
AMENDED COMPLAINT**

Defendant, Union Paving Company, answers the First Cause of Action of the First Amended Complaint on file herein, and admits, denies, and alleges as follows:

\* \* \* \* \*

Second Defense

I.

Answering paragraph I, defendant admits that the plaintiff Downer Corporation is, and at all times herein mentioned was, a California corporation, having its principal office and doing business in the State of California; and admits that the defendant is, and at all times herein mentioned was, a corporation organized and existing under and by virtue of the laws of the State of Nevada, and is, and was, doing business at various places admits plaintiff Ray H. Downer is a citizen of the State of California; in the State of California; and except as thus admitted, denies each and every allegation contained in said paragraph I.

\* \* \* \* \*

III.

Answering paragraph IV, admits all of the allegations thereof; and in this connection alleges that subsequent to the execution of said written agreement and the formation of said joint venture the

parties thereto orally agreed that said joint venture would purchase from the War Assets Administration a certain sewage disposal system at Gardner Airfield, Kern County, California, and that a certain pump which was a part thereof would be used in said Mount Vernon Sanitation District Project and that the remainder of said Gardner Field surplus equipment would be sold and the proceeds of said sales retained by the said joint venture; that said Gardner Field Sewage Disposal System was purchased for and by said joint venture; and subsequent thereto as defendant is informed and believes and hence alleges, plaintiffs Downer and Downer Corporation wrongfully sold and converted a substantial portion of said Gardner Field Sewage System and converted the proceeds of said sale to their own use and have ever since failed and refused and do now refuse to account therefor to said joint venture or to defendant, although often requested to do so.

\* \* \* \* \*

### Third Defense

The First Cause of Action of said First Amended Complaint sets forth a claim growing out of a joint venture transaction; that said Mount Vernon joint venture continues in existence and the business and affairs thereof have not been wound up; and that there has been no termination or dissolution of the joint venture.

\* \* \* \* \*

Counterclaim  
For A First Counterclaim

I.

Plaintiff Ray H. Downer is a citizen of the State of California. Plaintiff Downer Corporation is a corporation incorporated under the laws of the State of California. Defendant Union Paving Company is a corporation incorporated under the laws of the State of Nevada. The matter in controversy exceeds, exclusive of interest and costs, the sum of three thousand dollars (\$3,000.00).

II.

On or about March 11, 1948, Plaintiffs and defendant entered into an agreement in writing, hereinafter called the Mount Vernon Joint Venture Agreement, a copy of which is attached to plaintiff's complaint herein as Exhibit "A", and which copy is hereby incorporated herein by reference.

III.

Defendant Union Paving Company has, at all times mentioned herein, done and performed all of the stipulations, conditions, and agreements stated in said written joint venture agreement to be performed on its part and in the manner therein specified.

IV.

On or about March 11, 1948, Downer Corporation, for and on behalf of said joint venture, entered

into a contract with the Board of Directors of said Mount Vernon County Sanitation District for completion of certain sewer construction in said district; that all of said construction has been performed to the satisfaction of said District and has been accepted by said District; and in this connection Defendant realleges and incorporates herein by reference all the allegations of Paragraph III of its Second Defense set forth above.

\* \* \* \* \*

### For A Sixth Counterclaim

#### I.

Defendant realleges and incorporates herein by reference all the allegations of Paragraphs I, II, III, and IV of its First Counterclaim set forth above.

#### II.

On or about February, 1949, plaintiffs wrongfully converted to their own use and parted with possession of a substantial portion of said Gardner Field surplus sewage system and sold, transferred, and delivered said property to persons unknown to defendant but known to plaintiffs.

#### III.

Plaintiffs have failed, neglected, and refused, and do now fail, neglect and refuse to account to defendant or to said joint venture for the profits made on said sales although often requested by defendant to do so.



IV.

All of said sales and transfers were made without the knowledge or consent or authorization of defendant and in violation of plaintiffs' fiduciary duty to defendant as a participant in said joint venture.

\* \* \* \* \*

/s/ HENRY C. CLAUSEN,  
Attorney for Defendant.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 2, 1954.



[Title of District Court and Cause.]

ANSWER TO "COUNTERCLAIM"

Now come the Plaintiffs, Downer Corporation, a California Corporation, and Ray H. Downer, and answering the "Counterclaim" on file herein admit, deny and allege as follows:

\* \* \* \* \*

Answering the Sixth "Counterclaim", Plaintiffs admit, deny and alleges as follows:

I.

Plaintiffs incorporate herein by reference their answers to Paragraphs III and IV of the First "Counterclaim", which Paragraphs are incorporated by reference in Paragraph I of said Sixth "Counterclaim".

## II.

Deny each and every, all and singular, the allegations contained in Paragraph II of said Sixth "Counterclaim"; deny that on or about February, 1949, or at any other time or at all Plaintiffs wrongfully or otherwise converted to their own use and parted with possession of a substantial portion or any of said Gardner Field surplus sewage system;

## III.

Deny each and every, all and singular, the allegations contained in Paragraphs III and IV of said Sixth "Counterclaim".

\* \* \* \* \*

/s/ FORREST E. MACOMBER,

/s/ GORDON J. AULIK,

Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed February 10, 1954.

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[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PRO-  
POUNDED BY DEFENDANT TO PLAIN-  
TIF RAY H. DOWNER

Now comes the Plaintiff Ray H. Downer and files this, his Answers to the Interrogatories Propounded by Defendant to Plaintiff Ray H. Downer pursuant to Rule 33, Federal Rules of Civil Procedure:



1. Did you ever have an agreement with R. H. White relating to a certain surplus sewage system located at Gardner Air Field, Kern County, which said system was purchased in March, April or May, 1949, in your name from the War Assets Administration?

Answer: Yes.

2. If your answer to interrogatory number 1 is yes, was the agreement written or oral? If written, attach a copy hereto. If oral, explain the agreement in detail.

Answer: Oral. The purchase of the Gardner Field surplus equipment from the War Assets Administration arose out of the following circumstances: Mr. J. A. Dowling, President of Union Paving Co., insisted upon ordering the sludge pump for the Mt. Vernon Project from the Chicago pump company himself, and in endeavoring to get it for a cheap price, delayed the ordering of it for several months. This was a special pump that had to be ordered from Chicago and there was a considerable delay on filling orders. As a result of Mr. Dowling's delay in ordering the pump, there was no sludge pump available to install in the Mt. Vernon Project when it was completed and, therefore, the project could not be accepted and until it was accepted the entire payments on the project were held up. The Union Paving Co.-Downer Corporation joint venture wanted to get the project accepted as quickly as possible, and Mr. R. E. White was the project engineer. In talking to Mr. White, he indicated that if we could get a used sludge pump

installed on the Mt. Vernon Project and make a complete test of the plant, he would be agreeable to accepting the project on behalf of the Mt. Vernon Sanitary District and when the new pump came from Chicago, it could be installed in place of the used pump, and this would expedite the entire payment on the project to the joint venture. Mr. White suggested that a sludge pump at Gardner Field was available, and in February, 1949, Mr. White and myself went to Gardner Field to investigate. There we talked with the custodian and he said that the plant had been put up for sale by the War Assets Administration on February 11 but that they had not received a satisfactory bid. I reported this entire matter to Mr. Dowling, the President of Union Paving Co., and he stated that it would be a good policy for Union Paving Co. and Downer Corporation to take Mr. White in on the purchase of the Gardner Field plant and Mr. Dowling requested me to purchase the Gardner Field plant from the War Assets Administration in my name and then sell one-half ( $\frac{1}{2}$ ) interest in it to Mr. White for \$2,000.00, but to keep it out of the joint venture between Downer Corporation and Union Paving Co., and that Union Paving Co. would advance the money to purchase the Gardner Field plant. In accordance with Mr. Dowling's suggestion, I asked Mr. White if he would be agreeable to purchasing the Gardner Field plant from the War Assets Administration as a joint venture between us—Mr. White to have a 50% interest therein and Downer Corporation to have a 50% interest

therein. I did not mention Union Paving Co.'s interest therein because Mr. Dowling specifically asked me not to do so. Mr. White was agreeable to this, and I telephoned him about February 18, 1949, and told him that I had offered \$3,750.00 to the War Assets Administration for the plant but this was not acceptable but that they indicated that they would entertain an offer for \$4,000.00. Mr. White said to go ahead and bid \$4,000.00 and I submitted a bid to the War Assets Administration in my name personally to purchase the plant for \$4,000.00. I explained this whole transaction to Mr. Dowling of the Union Paving Co. and on February 28, 1949, Union Paving Co. issued its Check No. 26901 for \$500.00 to Norman L. Hawkins in payment for his services for "inspection on treatment plant equipment Gardner Field." This check was signed by R. H. Downer and J. A. Dowling. On February 28, 1949, Union Paving Co. issued its check No. 26902 for \$4,000.00 and had it certified for the purchase of War Assets Administration Disposal No. RSF10-56 Item No. 10, T-501 Incinerator w/steel stack, etc., payable to the Treasurer of the United States. On February 28, 1949, Union Paving Co. issued its check No. 26903 for \$300.00, as follows: For the faithful performance in connection with purchase of WAA Disposal No. RSF10-56, Item No. 10 T-501 Incinerator, etc. On July 27, 1949, Downer Mt. Vernon Project issued its check No. 630 for \$4,800.00 as follows: Downer Mt. Vernon Project, Bakersfield, Calif., July 27, 1949, Pay to Union Paving Co. \$4800.00, Purchase of Treatment

Plant Equipment Gardner Field \$4800.00, By R. H. Downer, By J. A. Dowling.

On or about March 4, 1949, Mr. White gave me his check for \$2,000.00, and since Union Paving Co. was not keeping its agreement to furnish the money for the payroll on time, I used this money to meet the payroll for the Union Paving Co.-Downer Corporation joint venture, and this was reflected on the books of the joint venture, with the result that this reduced the amount expended by the joint venture to \$2,800.00 on the Gardner Field purchase. Some time thereafter, Mr. Dowling insisted that the Gardner Field operation should not be charged to the Downer Corporation-Union Paving Co. joint venture, and a change was made on the books of the joint venture to show that of the \$2,800.00 expended to purchase Gardner Field for which reimbursement had not been received, \$1,400.00 was chargeable to Union Paving Co. and \$1,400.00 to Downer Corporation.

3. If your answer to interrogatory number 1 is yes, when was the agreement entered into?

Answer: On or about February 17, 1949.

4. If your answer to interrogatory number 1 is yes, did you ever receive any money from said R. H. White, relating to said sewage system?

Answer: Yes.

5. If your answer to interrogatory number 4 is yes, when did you receive said money? How much money did you receive?

Answer: On or about March 4, 1949, I received a check for \$2,000.00 from R. E. White.

\* \* \* \* \*

Dated: Stockton, California, September 5, 1957.

/s/ FORREST E. MACOMBER,

/s/ GORDON J. AULIK,

Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 6, 1957.

[Title of District Court and Cause.]

ANSWERS TO INTERROGATORIES PRO-  
POUNDED BY DEFENDANT TO PLAIN-  
TIF DOWNER CORPORATION

Now comes the Plaintiff Downer Corporation, a California Corporation, and files this, its Answers to the Interrogatories propounded by Defendant herein pursuant to Rule 33, Federal Rules of Civil Procedure:

\* \* \* \* \*

11. Did you or Ray H. Downer have any agreement with J. T. Masters or the J. T. Masters Company with respect to the Mount Vernon Sanitation District Project?

Answer: Yes.

12. If your answer to interrogatory number 11 was yes, was the agreement written or oral?



Answer: Oral.

13. If your answer to interrogatory number 12 was that the agreement was written, for your answer to this interrogatory, attach a true copy of said agreement. If your answer to interrogatory number 12 was that the agreement was oral, explain in detail the terms of the agreement.

Answer: With respect to the Mt. Vernon Sanitation District Project, Downer Corporation had an oral agreement with J. T. Masters, the terms of which in general were as follows: In Downer Corporation's bid there was an allowance of \$224,000.00 for the construction of the treatment plant. Masters orally agreed that he would construct the plant for \$200,000.00 plus one-half ( $\frac{1}{2}$ ) of the difference between \$200,000.00 and the amount of our allowance, to-wit: \$224,000.00, for the construction of the sewage treatment plant, provided that he could build the plant for less than the sum of \$224,000.00. There were difficulties encountered by Masters in building the plant and it actually cost him in excess of \$224,000.00, so that he lost money on the transaction and built the plant for \$200,000.00.

There was another matter that Masters was connected with, and that was as follows: Mr. R. E. White and myself entered into an oral agreement with J. F. Masters, of Fresno, California, by the terms of which Mr. Masters was to dismantle the Gardner Field plant, repair any damage to the realty, and remove the equipment, covered under the

purchase agreement, to locations in Bakersfield. Pursuant to this agreement with Mr. Masters, the property was removed from Gardner Field and was stored in Bakersfield, a portion at 1806 Oak Street and the remainder at 819 East Bundage Lane. In return for his services, Mr. Masters was to be reimbursed for all reasonable and necessary expenses for labor and materials required to accomplish the job. This reimbursement was to be made from the first money received from the sale of any of the equipment. After payment to Mr. Masters, the next proceeds of sale were to go to White, Downer & Dowling (Union Paving Co.) to reimburse them for money invested in plant. After return of our investment, all other sums derived from the sale of the property was to be divided one-half ( $\frac{1}{2}$ ) to White, one-fourth ( $\frac{1}{4}$ ) to Downer & Dowling (Union Paving Co.), and one-fourth ( $\frac{1}{4}$ ) to Masters. Any property which was not sold and converted into cash was to be deemed to be owned in the same proportions.

Dated: Stockton, California, September 5, 1957.

/s/ FORREST E. MACOMBER,

/s/ GORDON J. AULIK,

Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed September 6, 1957.

[Title of District Court and Cause.]

AMENDMENT TO ANSWER TO  
"COUNTERCLAIM"

Now come the Plaintiffs herein and, pursuant to leave of Court first had and obtained, file this, their Amendment to Answer to "Counterclaim", and do hereby amend their Answer to "Counterclaim" on file herein by adding thereto an additional Paragraph IV to the Answer to the Sixth "Counterclaim", as follows:

IV.

Plaintiffs allege that at the time of the commencement of this action there was, and now is, another action pending between Plaintiffs herein and the Defendant herein and one R. E. White on substantially the same facts as set forth in this Defendant's Sixth "Counterclaim" herein; that said prior action was filed by the said R. E. White, as Plaintiff therein, on January 4, 1952, in the Municipal Court, Bakersfield Judicial District, County of Kern, State of California, against the parties to this action, as Defendants therein, and said prior action is now at issue and is pending now, pursuant to a change of venue, in the Superior Court of the State of California, in and for the City and County of San Francisco, being Action No. 416818 therein.

And the Plaintiffs herein do hereby further amend their Answer to "Counterclaim" on file



herein by amending the prayer thereto to read as follows, to-wit:

Wherefore, Plaintiffs pray that Defendant take nothing by virtue of its "Counterclaims" and that Plaintiffs have judgment as prayed for in their First Amended Complaint on file herein, and that this Court grant a stay of proceedings as to the Sixth, Seventh and Eighth "Counterclaims".

/s/ FORREST E. MACOMBER,

/s/ GORDON J. AULIK,

Attorneys For Plaintiffs.

Duly Verified.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 7, 1957.

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[Title of District Court and Cause.]

### PRE-TRIAL CONFERENCE ORDER

A pre-trial conference was held in the above-entitled case before Honorable Sherrill Halbert, Judge, on the 9th day of October, 1957, and the following action was taken:

\* \* \* \* \*

4. The Defendant likewise has interposed counterclaims alleging that involved in this joint venture, the subject matter of this action, is a dispute over the purchase of certain surplus property from the United States Government called "Gardner Field." The Court has ordered the parties to sub-

mit briefs to the Court on that matter in order that this Court may determine whether or not it is a proper subject to be litigated in connection with the main action and whether this Court has any jurisdiction of that matter;

\* \* \* \* \*

Dated at Sacramento, California, this 26th day of November, 1957.

/s/ SHERRILL HALBERT,  
Judge of the United States  
District Court.

\* \* \* \* \*

[Endorsed]: Filed November 26, 1957.

[Title of District Court and Cause.]

### MEMORANDUM AND ORDER

This case is before the Court at this time for a pre-trial determination of three issues, namely, (I) whether there has been an accounting between the parties (on this issue a limited trial has been held); (II) whether, if there has been an account stated between the parties growing out of the alleged accounting, an action based upon it is barred by the statute of limitations; and (III) whether defendant's sixth counterclaim may properly be included as part of this litigation.

\* \* \* \* \*

### III.

The sixth counterclaim sought to be asserted by defendant relates to the alleged conversion by plain-

tiffs of the so-called "Gardner Field" assets. Defendant alleges that during the course of the construction operations on the Mount Vernon Project, plaintiffs and defendant entered into an ancillary agreement for the purchase of certain surplus equipment (a sewage system at Gardner Field) from the War Assets Administration, some of which equipment was needed for the completion of the Mount Vernon Project. Thereafter, defendant alleges, plaintiffs wrongfully converted to their own use, and sold to third persons, the remainder of the Gardner Field assets without accounting to the defendant or the joint venture for the proceeds of such sale. It appears undisputed from the record that joint venture funds were used to purchase the Gardner Field assets from the War Assets Administration (In fact, the joint venture reimbursed defendant for the purchase money originally furnished by defendant).

Defendant concedes that the Gardner Field assets are the subject of litigation pending in the Superior Court of the State of California, in and for the City and County of San Francisco, in an action brought by one White (who was assertedly involved in the acquisition and disposition of the Gardner Field assets, but who is not a party to this action) to quiet title to the said assets in which both plaintiffs and defendant are joined as defendants. Under Rule 13(a) of the Federal Rules of Civil Procedure, a counterclaim is compulsory if it arises out of the same transaction or occurrence as the main action, "except that such a claim need

not be so stated if at the time the action was commenced the claim was the subject of another action pending". On file in that action (No. 416818) is a cross-complaint by defendant against White and the plaintiffs herein asserting substantially the same purported cause of action attempted to be plead by the sixth counterclaim. In the light of these facts, the Court cannot consider the sixth counterclaim a compulsory counterclaim under Rule 13(a) (See *Meyercheck vs. Givens*, 186 F. 2d 85, 87 [7th Cir.]; *Esquire Inc. vs. Varga Interprises, Inc.*, 185 F. 2d 14, 18 [7th Cir.]).

To qualify as a permissive counterclaim under Rule 13(b), the claim must not arise out of the transaction or occurrence "that is the subject matter of the opposing party's claim". Under the most rational interpretation given to the words "transaction or occurrence" in Rule 13, however, the "Gardner Field" matter would, in the opinion of the Court, arise out of the same transaction or occurrence which forms the subject matter or the main action, for there is a very definite logical relationship between the Mount Vernon Project and the Gardner Field matter (*United Artists Corp. vs. Masterpiece Productions*, 221 F. 2d 213, 216 [2d Cir.]; *Lesnik vs. Public Industrials Corporation*, 144 F. 2d 968, 975 [2d Cir.]; *In re Farrell Publishing Corporation*, 130 F. Supp. 449, 452 [S.D.N.Y.]; and *E. J. Korvette Co. vs. Parker Pen Company*, 17 F.R.D. 267, 269 [S.D.N.Y.]). Therefore, the sixth counterclaim cannot qualify as a permissive

counterclaim, although it could qualify as a compulsory counterclaim but for the fact that it is presently asserted in a pending State Court action.

Concededly, defendant is left in a peculiar position with respect to its sixth counterclaim, but its opportunity to assert the claim, contrary to its contentions, is not subject to the whims and caprice of the plaintiffs herein and White. Sans some dereliction on the part of the defendant, its cross-complaint in that action, seeking affirmative relief as it does, will not be affected merely because the action filed by White in the State Court against defendant and plaintiffs may be subject to dismissal (under the provisions of § 583 of the California Code of Civil Procedure) for having been pending for more than five years. If the defendant is faced with any difficulty in connection with this cross-complaint, it will arise from its own dereliction in not bringing to issue and trial said cross-complaint within the five year period following the filing of the cross-complaint (See: *Tomales Bay Etc. Corp. vs. Superior Court*, 35 Cal. 2d 389, 394, 395).

This Court is, therefore, of the view that defendant's sixth counterclaim is improperly asserted in this action; the defendant having an available forum in the State Court in which the same claim is the subject of a pending action.

## Conclusion

Based on what has been said above, the Court has reached the following conclusions:

1. There has been no accounting between the parties to this action (It follows that a special master will in due course be appointed to render such an accounting);

2. The action is not barred by the statute of limitations; and

3. The sixth counterclaim of the defendant is not a justiciable issue in this case.

Let a supplemental pre-trial order be entered accordingly. Plaintiff will prepare and lodge with the Clerk of this Court a form of formal supplemental pre-trial order pursuant to this memorandum and order.

Dated: January 9, 1958.

/s/ SHERRILL HALBERT,  
United States District Judge.

[Endorsed]: Filed January 9, 1958.

[Title of District Court and Cause.]

SUPPLEMENTAL PRE-TRIAL  
CONFERENCE ORDER

Subsequent to the Pre-Trial Conference Order made, entered and filed by this Court on the .. day of .., 1957, the following proceedings were had:

A trial was had before the Court on Friday, November 29, 1957, on the following issues:



1. Has there been an account stated between the parties to this action.

2. Is Plaintiffs' action barred by the Statute of Limitations.

3. Does the Court have jurisdiction of the Sixth Counterclaim of the Defendant or, if the Court does have jurisdiction should it entertain said Sixth Counterclaim.

Evidence was presented to the Court on said limited issues on Friday, November 29, 1957, and thereafter both parties filed Memoranda of Points and Authorities and thereafter, on January 9, 1958, the Court made and entered its Order determining said limited issues as follows:

1. There has been no accounting between the parties to this action and, therefore, no account was stated between the parties hereto.

2. Plaintiffs' action is not barred by the Statute of Limitations.

3. The Sixth Counterclaim of the Defendant is not a justiciable issue in this case and should not be entertained by this Court and is hereby dismissed.

The Court will in due course appoint a special master to render an accounting between the parties to this action.

Dated: February 5th, 1958.

/s/ SHERRILL HALBERT,

United States District Judge.

[Endorsed]: Filed February 5, 1958.

[Title of District Court and Cause.]

### NOTICE OF MOTION

To Downer Corporation, Plaintiff, and Forrest B. Macomber and Gordon J. Aulik, Its Attorneys:

You and each of you will please take notice that on Monday, June 9, 1958, at the hour of 9:30 o'clock A.M. or as soon thereafter as counsel may be heard in the courtroom of the above entitled Court, Post Office Building, Sacramento, California, Union Paving Company will make the following motion, to said Court, to wit: that the Special Master heretofore appointed by said Court be instructed to include in the accounting ordered any and all transactions relating to the so-called Gardner Field transaction, or in the alternative that said Court make a final order of dismissal of defendant's counter-claim relating to said Gardner Field transaction. Said motion will be made upon all of the files and papers in said action, together with this Notice of Motion and the Memorandum of Points and Authorities attached hereto.

/s/ EVERETT S. LAYMAN,  
Attorney for Defendant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed June 2, 1958.



In the United States District Court, Northern  
District of California, Northern Division

Civil No. 6960

DOWNER CORPORATION, a California corpo-  
ration, Plaintiff,

vs.

UNION PAVING COMPANY, a Nevada corpo-  
ration, Defendant.

ORDER DIRECTING ENTRY OF FINAL  
JUDGMENT AS TO A PORTION OF DE-  
FENDANT'S CLAIMS AND FINAL JUDG-  
MENT OF DISMISSAL

This Court having, in its Memorandum and Order duly made and entered January 8, 1958, concluded that defendant's sixth counterclaim (which said claim relates to the so-called Gardner Field transaction) is not a justiciable issue in this case and defendant having moved this Court on the 8th day of June, 1958, that this Court instruct the Special Master, heretofore appointed herein, to include said Gardner Field transactions in the accounting to be had or in the alternative to enter a final judgment of dismissal of said sixth counterclaim and the Court being fully advised in the premises has determined that there is no just reason for delay.

Now, Therefore, It Is Ordered that defendant's sixth counterclaim be and the same is hereby dismissed.

It Is Further Ordered that this judgment of dismissal be a final adjudication of the claim set forth in said sixth counterclaim.

Dated: October 23, 1958.

/s/ SHERRILL HALBERT,  
United States District Judge.

Entered in Civil Docket, October 23, 1958.

[Endorsed]: Filed October 23, 1958.

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[Title of District Court and Cause.]

NOTICE OF APPEAL RE DOWNER  
CORPORATION

To the Clerk of the Above Entitled Court:

Please Take Notice that defendant, Union Paving Company, a Nevada corporation, appeals the judgment dismissing defendant's Sixth Counter-Claim, which said judgment was duly made and entered on October 23, 1958. Said appeal is taken to the Court of Appeals for the Ninth Circuit.

Dated: November 20, 1958.

/s/ EVERETT S. LAYMAN,  
Attorney for Defendant.

[Endorsed]: Filed November 24, 1958.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO  
RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States for the Northern District of California, do hereby certify that the foregoing and accompanying documents listed below, are the originals filed in this Court in the above-entitled case, and that they constitute the record on appeal herein as designated.

1. Complaint.
2. First amended complaint.
3. Motion to dismiss action.
4. Dismissal without prejudice as to second cause of action as set forth in first amended complaint only.
5. Order dismissing second cause of action, etc.
6. Answer and counterclaim to first amended complaint.
7. Answer to counterclaim.
8. Notice of motion to strike and of motion for a stay of proceedings under seventh and eighth counterclaims.
9. Order.
10. Interrogatories propounded to plaintiff Ray H. Downer.
11. Interrogatories propounded to Downer Corporation.
12. Answers to interrogatories propounded by defendant to plaintiff Ray H. Downer.

13. Answers to interrogatories propounded by defendant to plaintiff Downer Corporation.

14. Interrogatories propounded to Union Paving Co., a Nevada Corporation.

15. Amendment to answer to counterclaim.

16. Answers to interrogatories propounded to defendant.

17. Pre-trial conference order.

18. Memorandum & order.

19. Supplemental pre-trial conference order.

20. Order directing entry of final judgment as to a portion of defendant's claims and final judgment of dismissal.

21. Notice of appeal.

22. Stipulation dismissing appeal.

23. Notice of motion to strike stipulation from record.

24. Order granting motion to strike stipulation from record.

In Witness Whereof, I have hereunto set my hand and the seal of said Court this 4th day of May, 1959.

[Seal]

C. W. CALBREATH,  
Clerk,

/s/ By C. C. EVENSEN,  
Deputy Clerk.



In the United States Court of Appeals  
For the Ninth Circuit

Docket No. 16465

UNION PAVING COMPANY, a Nevada corpo-  
ration, Appellant,

vs.

DOWNER CORPORATION, a California corpo-  
ration, Appellee.

### DESIGNATION OF RECORD

To: The Clerk of the Above Entitled Court:

Appellant, Union Paving Company, hereby designates the following portions of the record to be printed as the record on appeal:

1. Paragraphs I, II and IV and Exhibit "A" to the Complaint.

2. The following portions of Appellant's (Defendant's) Answer to the Complaint:

a) Paragraphs I and III of the second defense to said Answer.

b) The third defense.

c) Paragraphs I, II, III and IV of the First Counter-Claim.

d) All of the Sixth Counter-Claim.

3. Appellee's Answer to Appellant's Sixth Counter-Claim.

4. The following Interrogatories and Answers to Interrogatories by Ray H. Downer:

Nos. 1, 2, 3, 4 and 5.

5. The following Interrogatories and Answers thereto by Downer Corporation:

Nos. 11, 12 and 13.

6. Appellee's Amendment to its Answer to Appellant's Counter-Claims, which said Amendment was filed October 4, 1957.

7. Paragraph 4 of the Pre-Trial Conference Order.

8. The Preamble, Paragraph III and the Conclusion to the Memorandum and Order made by Judge Halbert and filed January 9, 1958.

9. All of the Supplemental Pre-Trial Conference Order.

10. Notice of Motion filed by Appellant on or about May 30, 1958, which said Notice stated that Appellant would move the District Court to instruct the Special Master to include in the accounting any and all transactions relating to the so-called Gardner Field transaction or in the alternative that said Court make a final order of dismissal of Appellant's Sixth Counter-Claim.

11. The Order directing entry of final judgment as to a portion of Appellant's claims and final judgment of dismissal.

12. Appellant's Notice of Appeal.

13. This Designation of Record.

Respectfully submitted,

/s/ EVERETT S. LAYMAN,  
Attorney for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed May 15, 1959. Paul P. O'Brien,  
Clerk.



[Title of Court of Appeals and Cause.]

### STATEMENT OF POINTS ON APPEAL

The District Court erred in that:

1. It refused to hear a counter-claim in which it had jurisdiction of the subject matter and of all necessary parties.

2. The Gardner Field matter was an essential portion of the accounting before the Court.

3. There was no other Tribunal in which the cause was triable at the time the District Court dismissed Appellant's Sixth Counter-claim.

4. The Sixth Counter-claim was either a permissive or a compulsory counter-claim.

Respectfully submitted,

/s/ EVERETT S. LAYMAN,  
Attorney for Appellant.

Certificate of Service by Mail Attached.

[Endorsed]: Filed May 29, 1959. Paul P. O'Brien, Clerk.